No. 22,180

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

LEONARD L. MEAD, ATHERT CHUNN, A. V. HOOVER, RICHARD QUINN, ALDEN JOHNSON, VIOLET MEAD, and RAY R. SPENCE,

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR APPELLEES.

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TABLE OF AUTHORITIES CITED

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BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

This brief is filed on behalf of all of the appellees.

The appellant, United States of America, commenced the instant action against appellees by filing its complaint on July 1, 1964. In said complaint, appellant asserted claims against each of the named defendants based upon three alternate theories of recovery: (1) statutory forfeitures and double damages for alleged violations of the False Claims Act (Title 31, U.S.C. §231); (2) payment by mistake; and (3) administra-

tive claims by the Agricultural Stabilization and Conservation Committee. [Tr. 2.][1]

The United States District Court for the Central District of California (Peirson M. Hall, Judge) entered judgment denying appellant's claims as against each of the defendants. [Tr. 108.] Appellant's appeal from that judgment is limited to its alleged right to recover under the False Claims Act or, alternatively, for alleged payments by mistake. Appellant expressly abandoned its administrative claims theory. (Brief pp. 1, 5.)

STATEMENT OF THE CASE.

In 1957, 1958, and 1959, the United States Department of Agriculture administered an agricultural conservation program pursuant to the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590a-590q. Pursuant to this program, the United States shared with farmers and ranchers located in the continental United States the cost of constructing approved soil and water conservation dams, diversion ditches, and similar structures. [Tr. 101-102.]

Defendant and appellee, Lennard L. Mead (herein called Mead), was an approved contractor for the conservation program in Ventura County during the years in question. Each of the other defendants was either an owner or lessee in charge of parcels of land in Ventura County on which Mead constructed conservation projects. [Tr. 102.]

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[1]The designation "Tr." as used herein refers to the Transcript of Record. The designation "Rep." refers to the Reporter's Transcript of Proceedings.

A. Procedure for Conservation Practices.

In pursuance of the conservation program, the Department of Agriculture developed a number of forms for use in obtaining approval of conservation projects or "practices" for federal cost sharing.[2] A project may be initiated by the filing of a Request for ACP Cost-Sharing (Form ACP-201) with the appropriate County Agricultural Stabilization and Conservation Committee in charge of approving and administering programs within the County. [Tr. 102.] The proposed project is then referred to the Soil Conservation Service, an agency of the United States Department of Agriculture, for technical work. [Rep. 27; Tr. 102.]

After completion of an approved project, the farmer files an application for payment on Form ACP-245 with the County Committee for the government's share of the costs. If the farmer also executes a form ACP-250, Purchase Order for Conservation Materials and Services, the contractor receives the federal cost-share payment directly. [Tr. 101-103; Rep. 26-43.]

The Form ACP-245, application for payment, shows the number of units of work and materials performed and supplied for each practice, and the government's approved cost share. [See, *e.g.*, Ex. 59.] The Form ACP-250, purchase order authorizing payment of the federal cost share directly to the contractor, shows the number of authorized units furnished, the "Fair Price

[2]Projects under the conservation program are generally referred to as "practices," as shown in the government's brief and much of the documentation in the record.

or Sales Price" per unit, the "Total Maximum Cost," "Maximum Payment By Government" and "Maximum Payment By Farmer." The Form ACP-250, also contains a certification by the farmer "that the price paid to the vendor does not exceed the difference between the fair price, if applicable, and the payment by the Government." [See, *e.g.*, Exs. 57, 58, 60.]

Although the farmer's signature is required on the various forms, in practice they are filled out by the County A.S.C. Committee, Soil Conservation Service and contractor. The farmer merely signs them. [Rep. 28-48; Tr. 103.]

B. The Facts in the Instant Case.

In the instant case, Mead, himself a farmer, approached the other farmers and ranchers to encourage them to adopt soil conservation practices. Mead was approved as a contractor by the Department of Agriculture. In some instances, because the farmers could not afford payment in cash, he agreed to accept payment in services or in property other than money. In other cases, where he "thought that it warranted the extreme," he simply gave a "discount." [Rep. 110-111; Tr. 102-104.]

Mead, having only limited education, relied on Eldridge Cornell, of the Ventura County A.S.C. Committee, for assistance in the preparation of the various forms which were presented to the farmers for signature and filed with the governing agencies. [Rep. 26, 376-377.] The information entered in the forms was supplied by the County Committee, the Soil Conservation Service and Mead. The farmers merely signed the forms presented to them—in many cases, while the

forms were still incomplete and without looking at them closely or understanding them fully. [Tr. 103; Rep. 46-47, 228, 285, 290, 369-370.] Some of the documents were signed by employees of the farmers rather than the farmers themselves. [Rep. 247, 253; Exs. 17, 28, 29, 33, 56.]

Mead regarded the terms "cost" and "price," used in the various documents, as being synonymous. In preparing the invoices which he submitted to the government in support of the applications for payment, he computed the cost in terms of the work actually performed at the "fair price" he quoted, which he believed the "true cost" of the project. In each instance, he believed that the government was receiving "its money's worth," regardless of the arrangement he made with the particular farmer as to the farmer's share. [Rep. 130-132, 142-143, 152-153, 156, 382-383.]

The facts relating to Mead's transactions with each individual defendant are as follows:

1. A. V. Hohn.

Mead constructed three soil conservation projects on the property of defendant A. V. Hohn in the years 1957, 1958, 1959 respectively. In 1957, Mead constructed an errosion control dam on Hohn's property. On April 30, 1957, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee showing a cost of $2,014 for the project. The documents which required the farmer's signature for this practice were signed by Hohn's foreman. Hohn did not live on the property himself. Mead received the sum of $1,500 as payment of the

government's share of the cost. [Exs. 17-22; Rep. 247.][3]

In 1958, another dam was constructed on Hohn's premises. On February 20, 1958, an application for payment and invoice prepared by Mead were submitted to the County Committee showing a cost of $2,580 for the project. Mead received from the government a cost share in the sum of $2,064. [Exs. 23-27.][4]

In 1959, a third conservation practice was constructed on Hohn's property by Mead. The government forms (Forms ACP-245 and 250) were signed by the wife of Hohn's foreman. An application for payment and invoice prepared by Mead were submitted to the County Committee on March 27, 1959. The price or cost of the project indicated in such documents was $1,377. The government paid Mead a cost share of $804.50. [Exs. 28-36; Rep. 253.]

Mead received no cash from Hohn for any of these projects. However, Hohn's foreman contributed labor and equipment owned by Hohn; he drove a tractor and ripper for several hours a day assisting Mead with construction. [Rep. 119, 132-133, 248, 258-259.] Hohn also gave Mead a trailer valued at approximately $1,000, three sheep and the use of a pasture for his cattle. [Rep. 134, 136, 248-249, 257-258.]

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[3]The Complaint in this action was filed on July 1, 1964, more than six years after the filing of the alleged false claims connected with this project. [Tr. 2.] Accordingly, the government's suit against Mead and Hohn on this count is barred by the statute of limitations. 31 U.S.C. §235. Appellant's brief concedes that the statute of limitations "may have run" with respect to some of its claims, but does not identify them. (Brief, p. 5, n. 6.)

[4]The alleged violations of the False Claims Act with respect to this project are barred by the statute of limitations. See footnote 3, *supra*.

There was no understanding between Hohn and Mead that Mead was to do the work for only a federal cost share. Hohn was always to contribute something of value. [Rep. 250.] Hohn did not want to put any cash into the projects but told Mead to take what he could use as compensation, which was agreeable to Mead. [Rep. 134.] Hohn believed that the various items of property and services contributed on his behalf satisfied his indebtedness. [Rep. 259.]

Mead was referred to a document he had signed (but had not prepared) in connection with the government's investigation in this matter in which he allegedly stated that he gave Hohn invoices showing cash "discounts," which invoices were different from those Mead submitted to the government. [Ex. 81; Rep. 118-119.] But Mead testified only that it was his "general practice" to send such invoices to the farmer; he could not recall specifically that he sent them to Hohn and no copies were produced. [Rep. 138-141.] Hohn testified that he did not recall seeing any invoices. [Rep. 255.]

2. Violet Mead and Gale B. Graham.

In 1958, Mead constructed a soil conservation project on the property of his mother, defendant Violet Mead. An application for payment was filed with the County A.S.C. Committee on May 6, 1958. Such application, together with Mead's invoice, showed a cost of $2,888. The government paid Mead a cost share of $2,175. [Exs. 71-73A.] Mead was supporting his mother and did not collect any money from her for the project. [Rep. 187.]

Also in 1958, Mead constructed a soil conservation practice for Gale B. Graham on the Henderson Ranch.

The application for payment was filed May 8, 1958, supported by Mead's invoice. The cost was $3,268. The government paid Mead $2,500. [Exs. 67-70.] Mead testified that Graham and the Henderson Ranch people would not contribute anything except the land on which the dam was constructed. [Rep. 202.][5]

3. Richard Quine.

In 1959, Mead suggested to defendant Richard Quine that he avail himself of the soil conservation program by having an errosion control dam and diversion ditch constructed on his property. Quine told Mead that his budget would not allow him to pay more than $500 for such a project. Mead agreed to do the work and accept $500 as Quine's share. [Rep. 141-142, 265-268.]

On April 12, 1959, an application for payment and invoice prepared by Mead were filed with the County A.S.C. Committee showing a cost or price of $3,956.09. The government paid Mead the sum of $2,389.80. [Exs. 37-44.] Quine paid Mead $500 as agreed. [Rep. 219-221.]

Quine testified that Mead did not show him any statement or bill showing the total cost reported to the government. [Rep. 276.] Mead produced an invoice which he said he prepared for Quine showing a "discount" [Ex. 42-A], but there was no evidence that he sent it to Quine. He still had the original in his file and could not swear that he sent a copy to Quine. [Rep. 146-149, 363.] Quine testified that he never saw such

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[5]Appellant's trial counsel stated that Graham was not made a defendant in part because of the statute of limitations. [Rep. 417-418.] Actually, the statute of limitations had expired as to all of the alleged false claims arising out of the projects for both Graham and Violet Mead. See footnote 3, *supra*.

invoice before nor did he see the invoice which Mead submitted to the government [Ex. 42]. [Rep. 264].

4. Alden Johnson.

In 1959, Mead approached defendant Alden Johnson and told him his ranch was approved for soil conservation work and asked if he would care to go along with it. Johnson said he would if his share of the work could be done for approximately $300, which was his "budget." Johnson did not have any discussion with Mead concerning the government's share of the cost, nor did he recall getting any estimate from Mead as to the total cost of the project. [Rep. 221, 282.]

When Mead presented the various government forms to Johnson for his signature, Johnson did not read the "fine print." He was not familiar with the soil conservation program and assumed everything was proper when he signed them. [Rep. 282-285.]

On April 12, 1959, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee showing a cost or price of $1,849.75. The government paid Mead the sum of $1,156.90. [Exs. 46-55.] Johnson paid Mead the sum of $317.40. [Rep. 219.]

Mead's invoice [Ex. 51] to the government represented Mead's full price or cost computed on a fair-hourly rate for the work he actually performed. He accepted from Johnson what he could get and treated the rest as a "discount." [Rep. 156, 159, 174; Tr. 103, 105.] Mead produced a document which he kept for his own records showing the "discount" to Johnson [Ex. 51-A], but could not say that he gave Johnson a copy. [Rep. 170-173.] Johnson testified that he had no dis-

cussions with Mead concerning any discount and did not recall seeing any invoices prepared by Mead. [Rep. 289-290.]

5. Albert Chunn.

In 1959, Mead contacted defendant, Albert Chunn, concerning the construction of an erosion control dam on Chunn's property. On June 18, 1959, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee. The quoted price or cost was $4,464. The government paid Mead $2,500 for the project. [Exs. 1-16.]

Mead and Chunn agreed that since Chunn could not pay any cash, he would furnish services and equipment to assist in the construction of the dam and would permit Mead to use a large pasture to graze his cattle. Among other things, Chunn contributed a tractor which he operated himself and a sprinkler system. He pumped water for the sprinkler system and built several small ponds to supply it. Although Chunn and Mead had no specific agreement as to the value of Chunn's services and the grazing rights, they both recognized Chunn's contribution as having considerable value. [Rep. 112, 115, 232, 395-399, 408.]

Both Mead and Chunn testified that the approximate value of Mead's use of Chunn's pasture was $600. [Rep. 112, 232.] Mead stated in the statement he signed in connection with the government's investigation [Ex. 81] that he put a value of $665 on the work performed by Chunn. But he admitted at the trial that he could not really price Chunn's work [Rep. 113]; that he did not keep any records and his figure was only an estimate [Rep. 209]; and that he had only considered

Chunn's tractor work without taking into consideration the sprinkler system. [Rep. 126-127.] Chunn himself testified that the figure of $665 was not the fair value of his contribution to the practice. [Rep. 232.] He offered evidence in some detail as to the extent of his services at a significantly greater total value than Mead's estimate. [Rep. 395-399; Exs. C-D.]

As with several of the other farmers, Mead said he thought he had made up an invoice for Chunn showing a cash discount. [Rep. 116-117.] But none could be found and he was not sure. [Rep. 207-208.] Chunn testified that he did not receive any such invoice and never had any discussion with Mead about a discount. Chunn saw Mead's invoice to the government (which did not show a discount) but only after he had signed the purchase order applying for payment. [Rep. 227-228, 232-233.]

6. Ray R. Sence.

In 1959, Mead constructed a mechanical outlet on the property of defendant Ray R. Sence to replace a prior soil conservation project which had been washed out. Sence had paid his full share of the original project in cash and Mead testified that he felt "morally obligated" to undertake the corrective venture. Accordingly, it was agreed that Sence would only have to pay $800 for the second project, which sum, in part, was to be applied to the purchase of needed materials. Sence had no discussion with Mead about the total cost or the amount of the government's share. [Rep. 175-177, 291-292, 295-297.]

On March 30, 1959, an application for payment and an invoice prepared by Mead were submitted to the County A.S.C. Committee. The price or cost stated for

the project was $4,314.35. The government paid Mead $2,500. Sence purchased materials used in the project for which he paid $627.59; and he paid Mead $172.41 in cash to make up his agreed $800 share. [Exs. 56-62; Rep. 183, 296.]

Contrary to the government's contention, Mead did not testify that he mailed Sence an invoice showing a "discount." (Brief, p. 9.) As we read the record, Mead was talking about the invoice to the government [Ex. 60] when he said he was sure he made a "similar invoice to Mr. Sence," which "must have been mailed." [Rep. 183.] He did not state that he gave Mead an invoice showing a "discount." Sence testified, however, that he did not see the invoice Mead presented to the government. [Rep. 294.]

C. The District Court's Decision.

The District Court held that appellant was not entitled to recover any amount from any of the defendants. It concluded that none of the defendants had filed a false claim within the meaning of 31 U.S.C. §231; that no payments by the United States were made under mistake; and that there was no administrative determination which would serve as a basis for recovery against any of the defendants. [Tr. 106.]

In support of this decision, the Court entered Findings of Fact which included the following:

> "14. In no instance in this case was the information submitted on Forms ACP-245 or ACP-250

by any of the defendants incorrect or false insofar as reflected a price per unit of the work to be performed other than the actual price or an amount of units other than the number of units of such work actually performed and on which reimbursement was to be based."

"21. Based upon the Forms ACP-245 and ACP-250 introduced in this case, an agreed percentage of the total cost, as properly reflected thereon and properly chargeable to the United States of America was paid on behalf of the respective landowners.

22. In no instance has it been shown herein that any payment actually made by the United States pursuant to said forms was in excess of the fair market value of the work done on behalf of the farm owner and pursuant to the Agricultural Soil Conservation Program or in excess of the fair value of the United States' agreed share of the cost.

23. In no instance was the actual value of the work done shown to be less than the value represented by the defendant Mead.

24. During the years in question, and also pursuant to the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590g (a) to 590q (b), there existed a California State Agricultural Stabilization and Conservation Committee charged with the duty of administering the agricultural stabilization program throughout the State of California.

25. Pursuant to an investigation by certain offices of the United States Department of Agricul-

ture, said Committee was apprised, and subsequently informed the individual defendant landowners and the defendant Mead in the pending case, that charges had been filed against them involving an alleged violation of the Soil Conservation Act, and apprising them of an opportunity to have a hearing on these charges at the offices of said State Committee in Berkeley, California.

26. Subsequently, as shown by the official Minutes of said Committee, a recommendation of the Committee was made in the case of all defendants but Mead that no further action be taken against any of the defendants in this action, either civil or criminal. In the case of the defendant Mead, no recommendation either for or against such action was made.

27. No determination was made by said State Committee on any administrative claim which in any way constituted an administrative finding or determination of any violation of the statute herein sued upon." [Tr. 103, 105-106.]

QUESTIONS PRESENTED.

1. Did the District Court correctly hold that appellant is not entitled to recover from any of the defendants under the False Claims Act. (31 U.S.C. §231, *et seq.*)

2. Did the District Court correctly hold that appellant is not entitled to recover from any of the defendants by reason of any alleged payment by mistake.

SUMMARY OF ARGUMENT.

The evidence fully supports the District Court's findings that none of the defendants were guilty of filing false claims within the meaning of the False Claims Act.

In the first place, appellant did not sustain its burden of proving that documents filed by any of the defendants were false. Appellant argues that the statements as to the total "cost" of each practice were incorrect because Mead actually received less. But the government forms themselves do not contain any statement that could be interpreted as a representation that the contractor in fact received a specified sum. Indeed, the references in the documents to "fair price or sales price" and "maximum cost" would seem to at least impliedly permit the contractor to base his claim for government cost sharing on his normal price, even though he in fact does not collect that much because of the farmer's inability or unwillingness to pay the difference. The government is not hurt in any way if the contractor is forced to accept something less from the farmer so long as his quoted price is fair and he actually does the work. In such case, as the District Court found here, the government receives full value for its cost-share payment.

Secondly, even if the claims were regarded as being technically false or incorrect as appellant contends, that alone would not be sufficient to establish appellant's case. It must also be shown that the defendants had

knowledge of the falsity and sought to receive from the government something to which they knew they were not entitled. A fraudulent intent to deceive the government is required to constitute a violation of the False Claims Act. Certainly, appellant failed to sustain its burden of proving that any of the defendants had the requisite *scienter*. On the contrary, the evidence overwhelmingly established that any incorrectness in the claims was the result of innocent misunderstanding and none of defendants had knowledge of any error.

Finally, it was shown that in some instances Mead did in fact receive the full price or cost he quoted, the farmer's share being paid in services or property. In other instances, the government's claims are barred by the statute of limitations.

Thus, the District Court correctly concluded, as the evidence required, that appellant was not entitled to recover from any of the defendants under the False Claims Act and did not make any payments by mistake.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS DID NOT VIOLATE THE FALSE CLAIMS ACT.

It is true, as suggested in appellant's brief, that the purpose of the False Claims Act is to protect the funds and property of the government from "fraudulent claims"; and that a "claim" within the meaning of the act includes within its scope "all fraudulent attempts to cause the Government to pay out sums of money." (Brief pp. 21-22.) Of course, appellees do not deny that the various documents filed with the governing agencies in the instant case constitute "claims" within the meaning of the statute. Appellees do insist, however, that such claims were not "false." The law is abundantly clear that in determining that issue the statute must be strictly construed becuase it is penal in nature. *Rainwater v. United States,* 356 U.S. 590 (1958); *United States v. McNinch,* 356 U.S. 595 (1958); *United States ex rel. Brensilber v. Bausch & Lomb,* 131 F. 2d 545 (2d Cir. 1942); *Cahill v. Curtis-Wright Corp.,* 57 F. Supp. 614 (W.D. Ky. 1944.)

In the instant case, the District Court held that the claims in question were not false. It is apparent that appellant contends this was error on the theory that Mead did not actually receive the entire "cost" shown in the documents because some of the farmers did not pay the full difference between the government cost-share and the total cost reported. But the amounts required to be stated in the government's own forms were framed in terms of "fair price or sales price" and "maximum cost." (See Form ACP-250.) None of

the forms required the contractor or the farmer to represent that the entire "fair price" or "maximum cost" was actually paid. The farmer was only asked to certify that the price paid to the vendor did not exceed the difference between the fair price and the payment by the government. Appellant does not contend that this certification was false in any of the subject transactions.[6]

The District Court found that in every instance the quoted price was fair and represented the fair market value of the work actually performed; and hence, that the government received full value for its cost share based upon such price. Accordingly, there was nothing in the government forms which was false or incorrect. [Finds. 14, 22-23, Tr. 103, 105.]

In attacking these findings, appellant misses the point of the District Court's holding. The decision was not based solely upon the Court's conclusion that the government was not damaged, as appellant suggests. (Brief p. 24.) The findings concerning fair price and value bear directly upon the issue of whether the claims were "false." The price quoted was fair, the work was actually performed and the government got its money's worth because the value of the projects was at least equal to the quoted price. In other words, the government paid no more than its proper percentage of the fair price and reasonable cost of the project. Since this was all that the government's forms seemed to require, the court was entirely justified in its finding that the claims based thereon were not false.

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[6]Indeed, in most cases the farmer's payment to Mead was *less* than the difference between the fair price and the payment by the government. Mead himself bore the loss.

Appellant contends that the court's findings as to value were based upon "self-serving testimony." (Brief p. 25.) But that was merely a factor for the trier of fact to take into consideration for purposes of credibility. It is significant that all of the projects were approved by the government at the quoted price per unit and the government offered no evidence whatever that such price was unfair or unreasonable. The government's witness who administered the program could not dispute that the prices were fair and admitted they "very well could have been." [Rep. 96-100.] Under such circumstances, there would be no basis for this Court to say that the District Court's findings were "clearly erroneous" and they must be accepted on appeal. Fed. Rules Civ. Proc. 52(a); *Earle v. W. J. Jones & Son*, 200 F. 2d 846 (9th Cir. 1952).

Appellant also seeks to explain that the "fair price or sales price" language in the government's forms was placed there during war time solely to insure that the contractor did not receive excessive profits. (Brief p. 24.) Of course, no evidence to that effect was offered—and it would be immaterial in any event. It cannot be denied that the forms contained such language and could easily lead a farmer or contractor to assume that the government cost-share was based on "fair price" rather than the total compensation received by the contractor. If the "fair price" wording had no relevance or needed further explanation or qualification, it was up to the government to modify its forms. Having failed to do so, it is manifestly unfair to now contend that the claims were "false" because defendants may have misinterpreted such ambiguous language.

Appellant appears to recognize the weakness of resting its position on the government forms and repeat-

edly emphasizes the *invoices* prepared by Mead himself. Appellant argues that the invoices were "inflated" because they stated a total cost in excess of the amount Mead actually received. But Mead's invoices were obviously prepared in conjunction with the government's forms which they were intended to support. Mead's computations of cost in the invoices were derived from the "fair price" and number of units of work reported in the government forms. The invoices did not state that Mead actually received payment of the entire sum indicated. In other words, the invoices merely reflected the same figures that were reported in the various printed documents supplied by the government, based on the "fair price" language, and were no more "false" than the forms themselves.

For the foregoing reasons, it is submitted that the claims under scrutiny were not false or incorrect as appellant contends. If the government was misled in computing the respective cost-shares, it is not because of any false information supplied by Mead or any of the other defendants. The documents they submitted were filled out in accordance with their honest understanding of what was required and the trial court found that the information supplied was entirely true. In view of the strict construction required of the False Claims Act, the ambiguous language of the subject documents and the uncontradicted testimony in the record, it is submitted such findings cannot be held to be "clearly erroneous" under Federal Rule of Civil Procedure 52(a).

Appellant argues, nonetheless, that the invoices must be regarded as technically incorrect as a matter of law, because the soil conservation cost-sharing regulations contemplated that the farmer would in fact pay the

entire difference between the quoted cost and the government's payment. The evidence, of course, is that Mead did not so understand. There is no evidence that he even knew of the existence of such regulations. He testified, in substance, that he believed his invoices, based on his quoted price, represented the "true cost" of the projects; that he understood he was supposed to report the full "true cost" to the government in the invoices; and that the payment he was entitled to receive from the government was based on that cost. [Rep. 152-153; See also, Rep. 130, 132, 142, 156, 158-159.]

At the trial, in apparent recognition of the uncontradicted evidence, appellant's counsel urged that Mead's allegedly technically incorrect invoices fell within the False Claims Act even though Mead "may not have intended to defraud anybody." [Rep. 318.] Moreover, it was contended that the other defendants were equally guilty because they gave Mead "implied authority to act on their behalf" and hence were bound by his "false" invoices. [Rep. 425-427.]

This position was, and is, unquestionably contrary to law. It is not enough for the government to show that a claim is incorrect. It must also be shown that the defendant *knew* the claim was false and *intended to defraud* the government. These elements of guilty knowledge and fraudulent intent are expressly incorporated into Section 231 of Title 31 of the United States Code. Hence, the courts have repeatedly held that a specific intent to deceive is a prerequisite—a *sine qua non*—to liability under the Act. Moreover, the government has the burden of proving such elements by clear and convincing evidence. *United States*

v. National Wholesalers, 236 F. 2d 944 (9th Cir. 1956), cert. den. 353 U.S. 930; *United States ex rel. Brensilber v. Bauch & Lomb Optical Co.,* 131 F. 2d 545 (2d Cir. 1942); *United States v. Robbins,* 207 F. Supp. 799 (D. Kans. 1962); *United States v. Schmidt,* 204 F. Supp. 540 (E.D. Wis. 1962); *United States v. Park Motors,* 107 F. Supp. 168 (E.D. Tenn. 1952); *Cahill v. Curtiss-Wright Corp.,* 57 F. Supp. 614 (W.D. Ky. 1944).

The law is accurately summarized on pages 54-55 of the Opinion of the United States District Court in *Woodbury v. United States,* 232 F. Supp. 49 (D. Ore. 1964), affirmed in part and reversed in part on other grounds, 359 F. 2d 370 (9th Cir. 1966), as follows:

> "In an action under the False Claims Act, the United States must prove that there was a false representation of a material fact made with knowledge of its falsity, which false representation must be believed and acted upon by the United States. *United States v. Robbins* (D.C. Kan. 1962) 207 F.Supp. 799, 807. The proof by the Government must be by clear, explicit and unequivocal evidence. *Proctor v. Sagamore Big Game Club,* 265 F.2d 196, 202 (3 Cir. 1959); *Hablas v. Armour and Co.,* 270 F.2d 71, 77 (8 Cir. 1959). Although some authorities support the view that an intent to defraud is not an element of an action under the Act, *United States v. Toepleman* (E.D.N.C. 1956), 141 F.Supp. 677, the better reasoned cases support the view that such intent is necessary. *United States v. National Wholesalers,* 236 F.2d 944, 950 (9 Cir. 1956), cert. den. 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed.2d 724; *United States v.*

> *Schmidt* (E.D. Wis. 1962) 204 F.Supp. 540, 543, 544. *The mere showing that a person has signed a false or incorrect statement and presented it for payment is not, in itself, sufficient to hold such person liable under the False Claims statute. The Government must go beyond that and show that the person intended that the signing would procure from the Government something to which the person knew he was not entitled.* Proof must be had that such person intended, as a result of the signing of the statements, to defraud the Government. *United States v. Park Motors* (E.D. Tenn. 1952) 107 F.Supp. 168, 176." (Emphasis added.)

It appears from the government's brief on appeal that it now recognizes it had the obligation to prove the requisite fraudulent intent. However, with almost total disregard for the evidence and the trial court's findings, appellant cavalierly assumes that such burden was met.

With respect to Mead, appellant states that the evidence and findings demonstrate conclusively his "invoices intentionally overstated [his] actual charges." (Brief, p. 22.) Appellant further presumes that such "overstatement" was for the fraudulent purpose of obtaining payments Mead knew he was not entitled to. This constitutes a gross distortion of the record and findings. Appellant uses the terms "charges" and "cost" as the equivalent of payment actually received. But the evidence discussed previously shows that Mead did not purport to represent to the government the amount he actually *received* from the farmers, but rather the total "fair price" or "true cost" for the project.

So far as he was concerned, if he received anything less than this true cost, it was a personal gratuity or "discount" coming out of his own profit. Even if he was incorrect in this belief, and submitted erroneous invoices under the regulations because he did not disclose the discount, his testimony is that he did not know he was wrong or that he was not entitled to as much as he received from the government.[7]

As for the other defendants, appellant argues they must have known the claims were false because of Mead's invoices. But most of them testified that they did not even see the invoices. Nor is there any reason to assume they would have known anything was improper about them if they did see them. None of these men had any real knowledge or understanding of the soil conservation program or the various documents they signed. The documents were filled out by Mead and the various government officials and the farmers simply assumed they knew what they were doing. Even if it could be said that they were careless or negligent, that would not provide the requisite fraudulent intent for liability under the False Claims Act.

In addition to the invoices which Mead submitted to the government showing the same figures set forth in the government's printed forms, there was a great deal of discussion during the trial about some so-called "second invoices." These were allegedly given to the farmers by Mead showing "discounts" on each farmer's

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[7]Appellees know of no authority which precludes the contractor from reducing his profit in this fashion. In fact in some cases he may have no choice—as where the farmer simply refuses or is unable to pay his share. Is the contractor in such case required to take a further loss on the transaction by giving the government back part of its share?

share of the cost. Appellant relies on the trial court's finding that some such invoices were sent (without specifying which farmers received them) and argues the farmers should have known from them that the government was paying more than its proper share. No such inference can be drawn and the trial court refused to do so. [Finds. 17-20, Tr. 104.] All of the farmers testified that they had no discussions or knowledge as to how much the government would pay. There is no evidence any of them had any knowledge of how the government's share was to be computed. Hence, the fact that their own share was shown as a discount would have no particular significance to them so far as the government's share was concerned.[8]

It should also be borne in mind that two of the appellees, Hohn and Chunn, paid for their shares of the respective projects with services and property. (See statement of facts, *supra.*) The government's witness agreed that this practice is permissible [Rep. 51], and appellant does not contend otherwise. In effect, appellant merely argues about the value to be assigned to such compensation. Although the parties themselves had no specific agreement as to such value, they plainly intended and believed that Hohn and Chunn were con-

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[8]Furthermore, the testimony cited and discussed *supra,* in the statement of facts, shows that the farmers denied ever receiving any invoices showing discounts; and Mead himself admitted he could not prove he sent them and was not entirely sure which farmers, if any, were supposed to have received them. The court itself commented that there was no evidence the invoices were ever seen by anyone but Mead. [Rep. 315, 363.] Obviously, the finding that these invoices were sent is contrary to all of the evidence and the court's own observation to that effect. In truth, it is simply the result of a misunderstanding on the part of counsel who prepared the findings for the court, which the court inadvertently overlooked.

tributing the equivalent of their full share. It may be reasonably inferred from their testimony and the findings that the District Court concluded these defendants did pay in full, and Mead's invoices were not "inflated" or technically incorrect as to them under even the government's theory of the case.

As for the three appellees who paid an agreed amount, Sence, Quine and Johnson, the evidence is that so far as they knew they had no further obligation. Nor did they know that any representations were being made to the government which were in any way untrue or misleading as to how much they were contributing.[9]

To sum up, it is submitted that there is simply no basis in fact or in law upon which the District Court's judgment may be reversed. In accordance with the law, the court construed the statute strictly and found that the government failed to meet its burden of proving the claims in question were false. The language used in the forms themselves and the complete lack of knowledge of any impropriety on the part of all defendants compelled the conclusion that the claims were not false within the meaning of the Act. Even if Mead's invoices were technically inaccurate or misleading, the court found, at least implicitly if not explicitly, that none of the defendants knew of the errors, or had any intention to deceive the government or fraudulently obtain payments which defendants knew they were not entitled to.

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[9]The only transactions in which the farmers did not contribute anything at all were those involving Grahm, who is not a defendant, and Mead's mother, Violet Mead. As pointed out in footnotes 3, 4 and 5, *supra,* these claims are barred by the statute of limitations, along with one of the claims against Hohn.

This determination, particularly as to the issue of intent, is one of fact; it was for the trier of fact to judge the credibility of the witnesses and to draw inferences from the evidence. Fed. Rules Civ. Proc. 52-(a); *Earle v. W. J. Jones & Son,* 200 F. 2d 846 (9th Cir. 1952). Having done so, with ample evidence to support the findings and conclusions, the decision is not clearly erroneous or contrary to law and must be affirmed.

II.

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO ANY RECOVERY FOR ALLEGED PAYMENT BY MISTAKE.

Appellant also urges that it is entitled to recovery under the theory that the government made overpayments by mistake. The preceding discussion shows that the District Court found from the evidence that there were in fact no overpayments. The government got its full money's worth in each instance.

Appellant argues that it need not be damaged to recover under the False Claims Act. That may be true, but appellees know of no legal theory by which appellant is entitled to recover for an alleged overpayment by mistake when it has not been damaged and received full value for its payment. Does appellant mean to suggest that it may recover back some portion of the payments to Mead because of its technical interpretation of the soil conservation regulations, even though in fact it got its money's worth and the difference came out of Mead's profit? Surely so unjust a result can not be the law, as is demonstrated by appellant's lack of any citation of authority on this point.

Lastly, appellees can conceive of no theory under which any of the farmers could be held liable for this cause of action. They received no payments and did not make or cause any mistake. Appellant does not even advance an argument or explanation to support its contention that the District Court's decision was in error on this question.

CONCLUSION.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK R. WHITE,